IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 795 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AHMEDABAD MUNICIPAL TRANSPORT SERVICE

Versus

MOHMAD SALIM J SHAIKH

Appearance:

1. Special Civil Application No. 795 of 1993

MR MG NAGARKAR for Petitioner No. 1

MR RV DESAI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 23/03/2004

ORAL JUDGEMENT

1. Heard the learned advocate Mr.Nagarkar on behalf of the petitioner and learned advocate Mr.R.V.Desai

appearing on behalf of the respondent.

2. In the present petition, petitioner has challenged the award passed by Labour Court, Ahmedabad in Reference No.1722/84 dated 30th September, 1992, wherein Labour Court has set aside the dismissal order and granted the reinstatement with contitunity of service with 25% backwages of interim period. Initially this Court has issued Rule on 5th February 1993 not granting the stay against the reinstatement but the stay has been granted against the backwages of interim period with continuation that if ultimately petitioner loose in this matter then they should have to pay the amount of 25% backwages with 12% interest of interim period.

3. Learned Advocate Mr.Nagarkar, vehemently submitted that Labour Court has committed gross error in granting the reinstatement with 25% backwages. He submitted that constant and continues absence atleast about 12 occasions from June 1982 to May 1983 which goes to 196 days remaining absent without prior permission of the authority. This being a serious misconduct having cumulative effect and, therefore, punishment of dismissal is just and proper and Labour Court should not have to be interfered while exercising the power under Section 11 (A) of the I.D.Act, 1947. He further submitted that workmen has not given any explanation that why he remained absent for such a long period of 196 days. He also submitted that he remained absent even in the departmental inquiry. He also submitted that Labour Court in one occasion came to the conclusion that it is a gross misconduct and next moment came to the conclusion that punishment of dismissal is harsh, therefore, in such a contradictory finding Labour Court has committed basic error that requires interference of this Court. He submitted that workmen should have to be careful while working in the corporate body, so if he wants to go for leave then he should ask in prior point of time with the authority for a permission then he should go on leave. Otherwise the work of the public body will unnecessary suffer. He also submitted that there is no challenge to the inquiry by the workmen and, therefore, the Labour Court has committed gross error in set asiding the punishment while exercising the power under Section 11(A) of the I.D.Act, 1947. He read over before this Court para 10,11,12 and 13 and emphasized that normally in India this foreign concept is not accepted to keep the body and soul together by the workmen. Unemployment is known to everybody and in case of dismissal this is the only result and, therefore, no sympathy can be shown by the Court for such a gross misconduct case. He also

emphasized that punishment of dismissal is not such a shock and disproportionate which affect the judicial conscious of the Court. He relied upon one decision in support of his submission of the Apex Court reported in AIR 2003 Supreme Court page 1800. He submitted that in identical case on remaining absent by one Police Officer the Apex Court has come to the conclusion that such absence continues having cumulative effect the punishment of dismissal is proper. Therefore, he submitted that in this case also the punishment imposed by the disciplinary authority is legal and valid and interfered by the Labour Court while committing the error and, therefore, interference by this Court is necessary.

4. Learned Advocate Mr.R.V.Desai, appearing on behalf of the respondent workmen submitted that at the time of issuing Rule no stay has been granted, therefore, workmen has been reinstated in service. Now only question is about 25% backwages. He also submitted that if ultimately this Court dismisses the petition then workmen is not claiming the benefit of 12% interest as condition imposed by this Court while staying the backwages of interim period. He also submitted that the workmen has put number of years service with the Transport Service and he was dismissed from service on 8th March 1984 for remaining absent from June 1982 to May 1983 for a period of 196 days. Therefore, Labour Court has passed an award just in a reformative measure granting the reinstatement with 25% backwages for that Labour Court has not committed any error which require interference by this Court. He also submitted that there is no past bad records of the workmen. That fact has been mentioned by the workmen in the claim not controverted by the Transport Service and, therefore, the Labour Court has rightly set aside the dismissal order. He also submitted that decision which has been relied by learned advocate by Mr.Nagarkar is not applicable to the facts of this case on the ground that here Labour Court having the power under I.D.Act that in case the Labour Court is satisfied that punishment is disproportionate then Labour Court can set aside such punishment and to pass appropriate orders think fit. Therefore, according to Mr.Desai Labour Court has rightly passed just and proper order and in interim period gainful employment is not proved by the Transport Service, therefore, 25% backwages has been granted and 75% has been denied by way of punishment and that is sufficient punishment to the workmen who remained out of job for a period from 84 to 92 about 8 years. Therefore, he submitted that Labour Court rightly has powers and no interference is necessary from this Court while exercising the power under Article

227 of the Constitution of India.

5. I have considered the submission made by both the learned advocates. The workmen was working in the post of cleaner cum labourer in Transport Service. He remained absent from June 1982 to May 1983 about 196 days. Charge sheet was served to the workmen dated 23rd June 1983. He remained absent in the departmental inquiry and no explanation has been given by the workmen during the course of inquiry. On 8th November 1983 second show cause notice was served to the workmen and thereafter on 8th March, 1984 dismissal order was passed and that dismissal order was challenged by the workmen before the Labour Court under the machinery of I.D.Act. Exh.5 the statement claim has been filed by the workmen wherein it is mentioned that his past record is clean. Against the statement of claim written statement has been filed by the Transport Service vide Exh.6. Then Labour Court has stated that whether the workmen is entitled to be reinstated in service or not. The workmen was examined before the Labour Court vide Exh.16 and vide Exh.10. Workmen has filed purshis wherein legality and validity of departmental inquiry was not challenged by the workmen. Transport Service has produced the documentary evidence vide Exh.8 and because of the purshis filed by the workmen vide Exh.10 no oral evidence is led by the Transport Service. Thereafter Labour Court has heard both the learned advocates and ultimately Labour Court has discussed and gave reasons in paragraph 11 and 12 as under.

11. Now I have discussed above that the misconduct of the workman namely overstaying, habitual absentism without leave application is duly proved and the workman has not even tried to explain the cause of regularly remaining absent but the misconduct proved is not gross, hence the punishment of dismissal is too harsh and requires to be set aside under section 11-A of the I.D.Act and the Court has also to consider that there is wide spread unemployment in our country and it is difficult to secure a job to earn enough to keep body and soul together unlike in developed countries. Further more the State does not provide social benefits like unemployment allowance to unemployed persons to maintain themselves upto some extent as is being done in the developed countries. In an disciplinary

procedure, for an alleged fault of an employee, the punishment is imposed not in order to seek retribution or to tive vent to feeling of wrath. The main purpose of punishment is to correct the fault of the employee concerned, by making him more alert in the future and to hold out a warning to other employees to be careful in discharging their duties so that they do not expose themselves to similar punishment and the approach to be made is the approach, parents make towards their erring or misguided child.

12. In the present case all the above stated facts which are realities, have to be considered, the workman dismissed has to struggle for existence along with his family members and in that event also the court should and must utilize its powers under section 11-A of the I.D.Act which empowers the court to set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions if any as it thinks fit or give such other reliefs to the workman including the award of any leaser punishment in lieu of discharge or dismissal as to the circumstances of the case may require and in this case considering all the above stated reasoning, the order of dismissal is required to be set aside is set aside and the workman should be reinstated with 25% back wages from the date of termination till the date of reinstatement and the point no.1 is replied accordingly and I pass the following order in reply to point no.2.

6. Looking to the reasons given by the Labour Court that punishment is found disproportionate by the Labour Court, when workmen remained absent from June 1982 for a 16 days, July 1982 for 15 days similarly each month number of days absent is there. For each month workmen remained absent, no steps have been taken by the Transport Service against the workmen. Not only that the power of issuing the charge sheet while considering the enblock absentism for 12 months period no memo has been issued to the workmen that you are repeatedly remaining absent without any cause and without prior permission.

This being enblock absentism considered to be one misconduct and for that charge sheet has been issued. If the Transport Service is vigilant and really interested in the discipline then why the steps have not been taken in a point of time against the workmen. Each month remaining absent without prior permission is being a separate misconduct for that no steps have been taken and clubbing the entire 12 months absentism. The case of the Transport Service is that a workman remained 196 days continues absent without prior permission but if the facts have been considered in a different angle that why upto 11 months Transport Service has condoned the absent and not taken any steps against the workman though Transport Service was entitled to it. Meaning thereby that upto 11 months the absent of the workmen has been condoned and that lapse have not been taken seriously by the Transport Service and on the last occasion in May 1983 it was decided to issue charge sheet for a enblock period of 12 months against the workmen. Therefore, considering this fact the workmen who is a cleaner and labourer not working in Class I post in Transport Service naturally the standard to take care is of Class I officer that standard may not be expected from Class IV employee. This is the difference between Class I and Class IV employee. Therefore, no doubt, that he remained absent without prior permission but question is that no effective steps have been taken in time and created a circumstance to be showed as serious against the workmen and to dismiss the workmen from service when upto 11 months no action has been taken by the Transport Service. This is not the case of dishonesty and misappropriation which require an extreme penalty of dismissal. Absentism having some compelling circumstances in the family or some other factors for which workmen remained absent. It is not the case of the Transport Service that workmen remained absent that is how the work of cleaner have been suffered and put inconvenience to the Transport Service. The workmen working in a Class IV post and not in a sensitive post therefore, looking to the charge of absentism enblock period of 12 months absence the punishment of dismissal by the Labour Court has rightly interfered while exercising the powers under Section 11 (A) of the I.D.Act, 1947 while keeping in mind that no bad past records has been produced by the Transport Service and statement made in statement of claim that his past record is clean not controverted by the Transport Service and no other misconduct have been pointed out, therefore, if in entire service this being a misconduct committed by the workmen is not proper to impose an extreme penalty of dismissal. The Labour Court having vide power with discretion that in case if ultimately

looking to the material on record if Labour Court is satisfied that punishment of dismissal is harsh, unjust and unreasonable then Labour Court having power to interfere with such punishment. For that Labour Court has given reason in support of its conclusion. Workmen has admitted the legality and validity of inquiry and even finding is not disturbed by the Labour Court that charge is proved even though in such circumstances also the Labour Court having the power to interfere with the punishment. Such powers have been exercised while keeping in mind two object one is that punishment is disproportionate and another object is to have reformative measure in favour of the workmen so atleast his family may not be put in starvish. This reformative measure are necessary in light of the unemployment prevailing in this country and, therefore, Labour Court has discussed this aspect and pass appropriate orders granting reinstatement with 25% backwages and denied the 75% backwages by way of punishment. The submission of Mr.Nagarkar that it is a gross misconduct but then accumulation of the absent period and cumulative effect had been created by the Transport Service otherwise this accumulation of absent period and cumulative effect may not arise if every month the step have been taken by the Transport Service against the workmen for that Transport Service is competent and entitled to it. Therefore, now merely 12 months absence pointed out the seriousness the Court is not impressed by such submission and, therefore such submission cannot be accepted.

7. To deny 75% backwages for a period of 8 years to the workmen is considered to be punishment. In reported case AIR 1984 Supreme Court page 976, the relevant paragraph 3 is quoted as under:

> "Wide discretion is vested in the Tribunal under this provision and in a given case on the facts established the Tribunal can vacate the order of dismissal or discharge and give suitable directions. it is a well settled principle of law that when an order of termination of service is found to be bad and reinstatement is directed, the wronged workman is ordinarily entitled to full back wages unless for any particular reason the whole or a part of it is asked to be withheld. The Tribunal while directing reinstatement and keeping the delinquency in view could withhold payment of a part or the whole of the back wages. In our opinion, the High Court was right in taking the view that when payment of back wages either in full or part is withheld it

amounts to a penalty. Withholding of back wages to the extent of half in the facts of the case was, therefore, by way of penalty refereable to proved misconduct and that situation could not have been answered by the High Court by saying that the relief of reinstatement was being granted on terms of withholding of half of the back wages and, therefore, did not constitute penalty.

8. A decision which has been relied by Mr.Nagarkar is not under the provision of I.D.ACt, 1947. The second distinguish is that it relate to the Police Officer means discipline force, therefore, in Police Service such absence cannot be tolerated but same may not be applicable in case of cleaner/labourer who was working in transport service in Class IV post. Therefore, the decision which was relied by Mr.Nagarkar reported in AIR 2003 Supreme Court page 1800 is not applicable to the facts of this case.

9. In this background when punishment has been imposed by the punishing authority to any employee it is the duty of such punishing authority to impose a punishment while keeping in mind certain relevant factors one is socio-economic background of the workmen, second is the family background of the workmen, third is length of service, fourth is past record and fifth is compelling circumstances to commit misconduct. These are the relevant factors which must have to keep in mind by the authority at the time of imposing the punishment which is not done by the Transport Service but it has been rightly set aside by the Labour Court granting the reinstatement with contitunity service with 25% backwages.

10. In case of Scooter India Ltd, Lucknow, Vs. Labur Curt, Lucknow and Ors. reported in AIR 1989 Supreme Court page 149, Apex Court has observed that when disciplinary inquiry found to be fair and lawful and these findings were not vitiated in any manner that itself would not be ground for non interference with the order of termination of service by Labour Court. The direction of the Labour Court for the facts, for reinstatement with 75% backwages, on the ground that erring workman should be given opportunity to reform himself and prove to be loyal and disciplined employee of the Company that Courts is not illegal and arbitrary. The relevant discussions in paragraph 7 and 9 are quoted as under:

"7. The High Court has considered at length

the nature of the powers conferred on the Labour Court by Section 6 (2A) of the Act for setting aside an order of discharge or dismissal of a workman and substituting it with an order of lesser punishment and as such it cannot be said that the High Court has failed to consider the facts in their entirety. As regards the third contention, we may only state that the Labour Court was not unaware of the nature of the charges framed against the respondent or the findings rendered by the Inquiry Officer and the acceptance of those findings by the Disciplinary Authority. The Labour Court has observed as follows:

" The workman has unfortunately to blame himself for much of the bad blood which has developed between him and the management and therefore his conduct, motivated by ideals which are not relevant has been far from satisfactory. In so far as it was rough, bordering on rudeness and with highly exaggerated sense of his duties. In these circumstances it will meet the ends of justice if back wages to the extent of 75% are allowed to the workman. I would make my award accordingly but there shall be no order as to costs."

It cannot therefore be said that the Labour Court had exercised its powers under Section 6 (2A) of the Act in an arbitrary manner and not in a judicial manner. The Labour Court has taken the view that justice must be tempered with mercy and that the erring workman should be given an opportunity to reform himself and prove to be a loyal and disciplined employee of the petitioner Company. It cannot therefore be said that merely because the Labour Court had found the enquiry to be fair and lawful and the findings not to be vitiated in any manner, it ought not ot have interfered with the order of termination of service passed against the respondent in exercise of its powers under Section 6 (2A) of the Act.

9. Before parting with the matter, we would however like to observe that we hope and trust that the respondent wil conduct himself in future in such a manner as to prove himself to be a dedicated and worthy employee of a public sector concern. It will not only be in the interests of the respondent but in the interests of all the workers as well as the petitioner company if the respondent and all the workers like him perform their duties in such a manner as to promote the interests and welfare of a public sector concern like the petitioner company."

11. In the fact of this case the view taken by the Labour Court is almost at the side of giving a reformative steps in favour of the workmen so erring workmen can improve himself and become a discipline employee because of the fact that it was of one misconduct committed by the workmen in the entire service. Therefore, considering the entire facts and circumstances of the case and submissions made by Mr.Nagarkar is not accepted by this Court.

12. For the reasons stated above according to my opinion, the view taken by the Labour Court is perfectly alright, just and fair. No error has been committed by the Labour Court while passing an award, no irregularity is committed by the Labour Court and require no interference by this Court while exercising the power under Article 227 of the Constitution of India. Therefore, there is no substance in the present petition and present petition is dismissed. Rule discharged, ad interim releif stands vacated. It is made clear that condition which has been incorporated by this Court while granting the stay that petitioner has to pay 25% backwages with 12% interest that condition has also been deleted by this Court and, therefore, now the petitioner has to pay only 25% backwages of interim period without any interest to the workmen.

Date: 23/3/2004 [H.K.Rathod,J.]

Smita/